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GULF COAST ECOSYSTEM RESTORATION COUNCIL

Docket Number: 105002015-1111-04

Notice and Request for Comment on Local Contracting Preference Interpretation

AGENCY: Gulf Coast Ecosystem Restoration Council.

ACTION: Notice of interpretation and implementation with request for comment.

SUMMARY: The Gulf Coast Ecosystem Restoration Council (Council) is seeking comment on its planned implementation of the local contracting preference requirement of the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act).

DATES: Comments on this notice of interpretation and implementation are due [insert date 30 days after publication in the FEDERAL REGISTER].

ADDRESSES: The Council invites comments on its planned implementation of the local contracting preference requirement. Comments may be submitted through one of these methods:

Electronic Submission of Comments: Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> web site can be viewed by other commenters and interested members of the public.

Mail: Send to Gulf Coast Ecosystem Restoration Council, 500 Poydras Street, Suite 1117, New Orleans, LA 70130.

Email: Send to fcomments@restorethegulf.gov

In general, the Council will make such comments available for public inspection and copying on its website, <http://www.restorethegulf.gov/> without change, including any business or personal information provided, such as names, addresses, e-mail addresses, or telephone numbers. All comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Jeffrey Roberson at 202-482-1315.

SUPPLEMENTARY INFORMATION:

I. Background

The RESTORE Act, Pub. L. 112-141 (July 6, 2012), codified at 33 U.S.C. 1321(t) and note, makes funds available for the restoration and protection of the Gulf Coast Region through a new trust fund in the Treasury of the United States, known as the Gulf Coast Restoration Trust Fund (Trust Fund). The Trust Fund will contain 80 percent of the administrative and civil penalties paid by the responsible parties after July 6, 2012, under the Federal Water Pollution Control Act in connection with the *Deepwater Horizon* oil spill. These funds will be invested and made available through five components of the RESTORE Act. On August 15, 2014, the Department of Treasury (Treasury) issued regulations (79 FR 48039) applicable to all five components, and which generally describe the responsibilities of the Federal and State entities that administer RESTORE Act programs and carry out restoration activities in the Gulf Coast Region.

Two of the five components, the Comprehensive Plan and Spill Impact Components, are administered by the Council, an independent federal entity created by the RESTORE Act. Under the Comprehensive Plan component (33 U.S.C. 1321(t)(2)), the subject of this notice, 30 percent of funds in the Trust Fund will be used to fund the operations of the Council and to carry out projects and programs adopted in the Council's Comprehensive Plan. An Initial Comprehensive Plan was adopted by the Council in August 2013 and is available at <http://www.restorethegulf.gov/sites/default/files/Initial%20Comprehensive%20Plan%20Aug%202013.pdf>. In the coming months, the Council will create a Funded Priorities List (FPL) to fund and/or prioritize for further review programs and projects that restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region.

Programs and projects selected for funding in the FPL will be funded either through grants to the State members of the Council (Alabama, Florida, Louisiana, Mississippi, and Texas) or interagency agreements to the Federal members of the Council (the Departments of Agriculture, Army, Commerce, and the Interior, the Department in which the Coast Guard is operating, and the Environmental Protection Agency). Those State and Federal members of the Council may in turn award grants or contracts to carry out the funded programs and projects.

II. Discussion of this Interpretation and Implementation

The RESTORE Act requires the Council to “develop standard terms to include in contracts for projects and programs awarded pursuant to the Comprehensive Plan that provide a preference to individuals and companies that reside in, are headquartered in, or are principally engaged in business in a Gulf Coast State”. 33 U.S.C. 1321(t)(2)(C)(vii)(V). Application of a local contracting preference at the State and Federal level require separate analysis.

At the State level, the Council will not impose any special grant award condition requiring a local contracting preference. Each of the five Gulf Coast States already has a state law or laws pertaining to local contracting preferences. Most of these laws do not provide for any sort of preference for firms local to any other State or, in some cases, prohibit preferences for firms local to other States. Were the Council to require the States to provide a preference for firms local to the other States, those States with prohibitions against such preferences would be unable to participate in the grant program. Having one or more of the Gulf Coast States ineligible to receive grants under the Comprehensive Plan component would be antithetical to the purpose of the RESTORE Act. As such, the Council policy for State contracting action using RESTORE Act funds is to have each State act in conformance with its State law on contracting preferences with no further requirements. This practice is consistent with 2 CFR Part 200.319(b) which permits grant recipients to apply state or local geographic preferences in the evaluation of bids or proposals in cases only where a Federal statute, such as the RESTORE Act, expressly mandates or encourages geographical preference.

At the Federal level a local contracting preference is permitted only when a statute expressly authorizes or requires it. See 41 U.S.C. 3304(a)(5). It is the position of the Council that 33 U.S.C. 1321(t)(2)(C)(vii)(V) provides such an express authorization. However, given that the Council intends that Federal agencies contracting to implement a program or project under the FPL have discretion to make an award to the offeror whose proposal provides the best value to the Government, the Council has decided that a minimally restrictive form of a local contracting preference is appropriate. Accordingly, contracting Federal agencies may provide a preference to Gulf Coast firms if proposals are determined equivalent under all other evaluation

factors or, alternatively, may include a weighted evaluation factor providing a preference to Gulf Coast firm offers.

In order to prevent a Gulf Coast firm from serving as merely a pass-through for a firm outside the Gulf Coast region, to be considered a “local firm” an offeror must certify that it resides, is headquartered or is principally engaged in business in a Gulf Coast State. Further, the offeror must certify that it will perform at least a minimum percentage of the work under the contract. The methodology for determining whether an offeror meets this test is based on the Small Business Administration’s regulation found at 13 CFR 125.6.

The text below would be included in solicitations for Comprehensive Plan contracts that apply a local preference, and would be incorporated into the award. This term requires an offeror to disclose its status as a Gulf Coast firm and represent that it will perform a minimum percentage of the cost of the contract.

(a) The offeror represents as part of its offer that it () is, () is not a firm residing, headquartered or principally engaged in business in a Gulf Coast state.

(b) If the offeror represents that it is a firm residing, headquartered or principally engaged in business in a Gulf Coast state, the offeror shall furnish documentation to support the representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

(c) The offeror represents that in the case of a contract for services (except construction), the firm will perform services representing at least 50 percent of the total labor costs under the contract with its own employees.

(d) The offeror represents that in the case of a contract for supplies or products (other than procurement from a non-manufacturer of such supplies or products), the firm will itself manufacture such supplies or products representing at least 50 percent of the total manufacturing costs under the contract (excluding costs of materials).

(e) The offeror represents that in the case of a contract for general construction services, the firm will perform services representing at least 15 percent of the total labor costs under the contract with its own employees.

The text below would be included in solicitations for Comprehensive Plan contracts. This term notifies prospective vendors that the contracting agency will prefer Gulf Coast firms in making the award.

Proposal Preparation Instructions – Each offeror shall identify whether it is a firm residing, headquartered or principally engaged in business in a Gulf Coast state.

Evaluation Factor 1 – It is the policy of [Contracting Agency] to encourage the participation of Gulf Coast firms in the procurement process. As a result, this solicitation includes a preference for Gulf Coast firms. If [Contracting Agency] determines all other factors to be equivalent, [Contracting Agency] will give preference to a Gulf Coast firm. [Contracting Agency] will review your Gulf Coast firm status at the time the solicitation closes.

Evaluation Factor 2 [to be assigned relative weight by the Contracting Agency]– It is the policy of [Contracting Agency] to encourage the participation of Gulf Coast firms in the procurement process. As a result, this solicitation includes a preference for Gulf Coast firms. The Government will evaluate your proposal to determine if you are a Gulf Coast firm.

The Council invites comments on the proposed evaluation factors.

Will D. Spoon

Program Analyst, Gulf Coast Ecosystem Restoration Council

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